

Summary

State Succession and Private International Law

1. In Public International Law, State Succession is defined according to the Vienna Convention of 1978 on Succession of States in Respect of Treaties, and in the 1983 Convention on Succession in Respect of State Property, Archives and Debts, as „the replacement of one state by another in the responsibility for the international relations of a territory“.
2. Private International Law defines State Succession as the substitution of one state for another with regard to the legal system applicable in a certain territory.
3. In both Public and Private International Law, State Succession involves a „territory“.

A change in the population is of as little importance to the definition of the concept of State Succession as a change of government. For this reason, it can be very difficult to determine whether a state is to be regarded as a successor or predecessor state when a change of government coincides with the alteration of the state boundaries. It is theoretically possible to regard as constituting cases of State Succession those changes of government which are linked to fundamental changes of a revolutionary nature; however, in those cases, unlike traditional cases of state succession, the successor state is bound to inherit, without exception, all the rights and duties of the predecessor.

4. Territory is not to be understood as referring to the legal title empowering a state to exercise sovereignty, but rather, a geographical area subject to the jurisdiction of a state independent of the existence of a legal title.
5. In both Public and Private International Law, State Succession concerns „states“. However, each area of law has a different definition of „state“.

In Public International Law, „state“ means every subject of international law which is in the position to exercise jurisdiction over a geographical territory. In exceptional circumstances, an international organization can be party to a state succession when it is able to exercise jurisdiction over a geographical territory. On the other hand, an organization which is not subject to international law can be neither a successor nor predecessor state in a succession even when it exercises effective and independent authority over a geographical territory.

In Private International Law, „state“ means any organization with an effective legal system in a geographical territory, whether or not this organiza-

tion is a subject of international law. According to this definition, a „state can refer to not only a state in the international law sense, but also, for example, an international organization or independence movement.

6. In both Public and Private International Law, State Succession requires a „connection“ between the states involved with the succession and with the geographical territory concerned.

In Public International Law this connection arises through the fact that the predecessor and successor powers in the territory must have exercised sovereignty, and therefore effective and independent authority in the geographical area concerned.

In Private International Law , this connection arises through the fact that the predecessor and successor powers must have implemented their legal systems in the area concerned.

The Public and Private International Law definitions of successor state converge in that the implementation of a legal system in a geographical area is nothing but the consequence of exercising sovereignty in this territory.

7. In both Public and Private International Law, State Succession takes place through the substitution of the predecessor with the successor power in this context: by the substitution of the sovereignty of the predecessor in the territory concerned with that of the successor, or by the substitution of the legal system of the successor for that of the predecessor in that territory.

8. Neither in Public nor Private International Law is international recognition of a change in sovereignty a prerequisite for State Succession.

In International Public Law, the act of recognition does not have the effect of conferring rights, but is rather merely declarative in character.

International Private Law considers the effective application of a legal system on the territory involved as simply a factual question.

9. Nevertheless, international recognition of the change in sovereignty can have some influence in both Public and Private International Law for the juridical analysis of the applicable prerequisites for State Succession.

International recognition of a change in sovereignty constitutes a rebuttable presumption in favor of the existence of such a change in sovereignty. The presumption is rebuttable in both Public and Private International Law.

10. This presumption in favor of international recognition can be criticized. International recognition is, as it is practiced by the international community of states, a political measure which is essentially governed by diplomatic reasons and not by juridical ones.

11. Neither in Public nor Private International Law is international lawfulness of a change in sovereignty a prerequisite for State Succession.

State Succession in Public International Law is concerned with the determination of the legal consequences of a change in sovereignty of a territory, and especially the determination of the obligations of the successor state, without regard to the lawfulness of the change.

Generally, Public International Law does not prohibit the existence of an illegitimate legal system. It accepts the Private International Law premise that, in the interests of the parties, only the *de facto* legal system existing in a given geographical territory is considered.

12. Nevertheless, Public International Law recognizes sanctions for the case of an unlawful change in sovereignty. This concerns especially both secession, which violates the principle of the territorial integrity of states, and annexation. Annexation and secession can both result in either responsibility for the guilty state to the victim, or sanctions under the United Nations Charter.

13. As State Succession, by definition, leads to the substitution of one legal system for another in a particular geographical territory, it produces a conflict where these legal systems coincide in time and place. This conflict could be described as an „inter-successional conflict of laws.

14. The controversy in Private International Law focuses on the qualification of this conflict rather than its results. While some see this conflict as either „intrastate (i.e., domestic) intertemporal“, or „international-intertemporal“ in nature, others understand it as a conflict between jurisdictions in the nature of a change in governing law.

15. The former opinion alone is accepted.

Modern Private International Law acknowledges a foreign legal system only when it exists *de facto* in a given geographical territory. A legal system is ignored if at the decisive point in time it is no longer in place or in practical use in the area concerned.

16. Where a foreign legal system is no longer in place or no longer effective, and therefore officially ignored, the successor state may still adopt as its own and incorporate the private law of its predecessor.

17. Such an incorporation can relate not only to the past, but also to the future. In the latter case, it causes an interterritorial conflict of laws as it leads to the coexistence of two different legal systems in the „new“ area of the predecessor state.

18. If this incorporation relates only to the past, then from the point of view of the successor state, the conflict is „intrastate intertemporal“, and from the point of view of the rest of the international community, the conflict is „international intertemporal“.

From the point of view of the successor state, the result is two conflicting domestic laws in the area affected by the change in sovereignty: the retroactively adopted predecessor's law, and the newly adopted law. If the successor state is not a new state, it is obliged to choose territorially the applicable law for all cases which were concluded before the change in sovereignty, in order to determine whether and to what extent they are affected by the transitional provisions for the change in sovereignty. The intersuccessional conflict of laws then causes an interterritorial conflict concurrently with the intertemporal conflict.

From the point of view of all other states, the result is two conflicting laws of the same legislature, as is the case in any amendment to the law by the foreign legislature. The solution of this conflict lies in the substantive law of the foreign state. The only exception to this is when this law would injure the *ordre public* of the controlling jurisdiction. In such a case, the foreign law is inapplicable.

19. The solutions mentioned appear to have been used substantially by the German legislature in the reunification.

Chapter 6 of the EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*, Introduction Code of the German Civil Code) rests on the principle of the material incorporation of the private law legislation of the German Democratic Republic („GDR“) in so far as the past is concerned. From the time reunification took effect, the federal law theretofore applicable only in the Federal Republic of Germany („FRG“) took effect also in the former GDR.

20. Prerequisite for the application of these transitional regulations is the territorial choice of law decision of cases concluded before the reunification. Only thereby is it possible to filter out those cases subject respectively to the substantive law or the Private International Law of the GDR as adopted by the Federal Republic.

To determine the territorial application of the substantive law of the former East Germany, the Federal Supreme Court refers back to German *interlokal* law (defined as those conflict of law provisions regulating the relationship between the states of the formerly divided Germany).

Hitherto, the Federal Supreme Court has not expressed itself regarding the determination of the territorial application of the East German Private International Law provisions. The creation of new rules for interterritorial conflict of laws is however inevitable here, because the application of German *interlokal* law or East German Private International Law does not adequately solve all problems of territorial choice of law concluded before the reunification.

21. Where there is State Succession, Public International Law provides special protection to foreign citizens, who had rights based on the legal system of the predecessor state before the change in sovereignty.

The necessity of such protection was formerly questioned by both the socialist states and the former colonies. At least in the latter case, these objections have since been discarded in favor of the demands for special regulations.

22. This protection arises for the benefit of foreign citizens, i.e. all persons who are not citizens of the successor state and have not acquired citizenship following the change of sovereignty. The legal basis does not rest in a „Public International Law principle of protection of vested rights“, but in the mutual respect that the principle of sovereign equality requires, when certain citizens of one state have particular interests localized in the territory of another state, and are therefore subject to the legislation of the latter.
23. This protection can only benefit the state's own citizens if one takes the position that protection of aliens in Public International Law has its basis in international human rights, whether in the context of State Succession or in that of the law relating to aliens. This position may be desirable, but it does not reflect the present state of developments in Public International Law.
24. The protection of aliens in the context of State Succession in Public International Law does not encompass all rights which aliens may obtain under the legal system of the predecessor power. Only private, and to a certain extent mixed rights are protected, whereas public rights, which question the sovereignty of the successor powers, are excluded.
25. The interpretation that this legal protection should be restricted to those private or mixed rights with an economic value is, however, too restrictive. This approach is based on a misinterpretation of the previous international decisions in the context of the Public International Law protection of vested interests, which however did not address the issue of rights with no economic value.
26. As far as concerns mixed rights and, especially, concessions granted by the predecessor state, the successor state can choose between two solutions. Either it may adopt them in their entirety, or it may terminate them. In the latter case, the state is then liable to compensate the holders of those rights to the extent that they contain private rights.
27. The protection of mixed rights under the Public International Law of State Succession is only effective insofar as the corresponding duties are transferred from predecessor to successor state. This protection is therefore to be understood in the context of the theory of State Succession in state property, archives and public debts, of which it is necessarily the counterpart.
28. The protection of Public International Law in State Succession prohibits the successor state from not providing equivalent rights to aliens as the predecessor state granted before the succession.

29. Public International Law is silent regarding the means with which these rights should be guaranteed. The successor state is free to choose any of the following options, so long as the rights of aliens are not prejudiced. First, the successor state has the possibility to apply the law of the predecessor state without formally adopting it. Next, the successor state has the right to adopt as its own and incorporate the private law of the predecessor state in the affected territory. Lastly, the successor state has the right to apply retroactively its own law to the affected territory.
30. This requirement concerns only the moment in time of the change in sovereignty, and not the time afterwards. After the change in sovereignty, under Public International Law, the aliens would only be protected by international customary law relating to aliens.
31. Because it protects only those rights which have been acquired before the change in sovereignty and recognized by the predecessor state, the Public International Law of state succession includes rules for both interterritorial and intertemporal conflict of laws. Regarding interterritorial conflict of laws, Public International law protects not only those rights acquired from the substantive law of the predecessor, but also rights acquired from the substantive law of other states, if that law can be applied under conflict of law rules. Public International Law looks to the conflict of law rules of the predecessor state regarding this issue.

The conflict of law rules mentioned above are a part of Public International Law, and not Private, and their meaning is limited to that application.